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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 48.

LOUIS H. PINK, Superintendent of Insurance of the State of New York,

Petitioner,

v.

A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as ADAMS TRANSFER CO., H. L. BASS, as BASS BUS LINE, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

## BRIEF OF PETITIONER.

ELLIOTT GOLDSTEIN,
MAX F. GOLDSTEIN,
ALFRED C. BENNETT,
Counsel for Petitioner.

M. F. GOLDSTEIN,
ARTHUR G. POWELL,
BURKETT D. MURPHY,
JAMES N. FRAZER,
JAMES W. DORSEY,
1130 C. & S. Bank Building,
Atlanta, Georgia,
ALFRED C. BENNETT,
160 Broadway,
New York City.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

## INDEX.

**Cases Cited.**

## Statutes Cited.



## Textbooks Cited.

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## BRIEF OF PETITIONER.

The case comes to this Court on the grant of the writ of certiorari to the Supreme Court of Georgia, to review a decision of that Court, announced January 16, 1941 (adhered to on rehearing February 14, 1941), affirming a final judgment of the Superior Court of Fulton County, Georgia, which dismissed, with opinion (R. 80-81), the bill in equity brought by petitioner against the respondents herein.

### I.

### JURISDICTION.

(a) The judgment sought to be reversed was a final judgment of the Superior Court of Fulton County, Georgia, sustaining a demurrer interposed by the defendants to

the bill of complaint filed by petitioner, and dismissing the same with costs (R. 80-81). Under Georgia procedure an appeal lies directly to the Supreme Court on such a judgment by bill of exceptions. The Supreme Court of Georgia considered the appeal of plaintiff and denied with opinion.

(b) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, and the cases of **Roche v. McDonald**, 275 U. S. 449; **Sovereign Camp Woodmen of the World v. Bolin**, 305 U. S. 65, 83 L. Ed. 45, and **Adair v. Saenger**, 303 U. S. 57, 82 L. Ed. 649-652.

(c) The Supreme Court of Georgia passed upon the constitutional questions asserted in the trial court and denied them (R. 89-90). **The opinion of the court below** is reported in 191 Georgia 502, 13 Southeastern Reporter (2d) 337, and is appended to the record (R. 82-96, inclusive).

## II.

## SUMMARY STATEMENT OF THE QUESTIONS INVOLVED.

Petitioner, the statutory liquidator of an insolvent mutual insurance company, chartered under the laws of New York, whose statutes, as construed by the courts of that State, confine these corporations to the writing of assessable policies only, filed suit against members residing in Georgia.[1] His suit was dismissed on general demurrer and this action affirmed by the highest court of review. Briefly the controversy may thus be stated:

Petitioner contends that the respondents, voluntarily negotiating for and receiving casualty insurance in a mu-

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1 Petitioner charged respondents with liability for (a) the assessment levied on all policyholders after its approval by the domiciliary court, and (b) premium balances due by some of them [R. 10 (14)].

tual association, incorporated under the laws of New York, thereby occupied a dual position. (a) They became **members** of a **mutual** insurance association, **entitled to participate in the profits** and **subject to assessment for** its **losses,** and (b) they obtained a contract of indemnity against casualty losses, governed by the terms of their policies. Petitioner further claimed that the status of these respondents, as members, must be determined by the laws of New York.

Respondents contended that the mere act of obtaining insurance in a mutual company did not create the status of membership in the corporation unless the policies which they received contained some reference to the New York laws, particularly the assessable feature thereof, and that since neither the statute nor the provisions for assessment in the charter and by-laws appeared on the face of the policies,[1] the relationship to the company was that of insured only; that they had not become members and consequently were not mutual insurers. They contended that the policy of insurance becoming effective in Georgia only, the laws of that State would be examined to determine their status. The Courts below agreed with the respond-

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1 Respondents were not charged with liability arising out of the insurance policy; indeed, the insurance policy was not declared on in the original petition (R. 7); it was attached by amendment in response to a special demurrer interposed by one of the respondents and exhibited only as evidence of membership and not as a basis for liability. The policies merely proved that the respondents were members, and this could have been established by other evidence.

Compare **Lloyd, Supt., v. Cincinnati Checker Cab Co.,** ... Ohio .... 36 N. E. (2) 67, a case almost identical in its facts and applicable principles of law. There the Court, after examining defenses identical with those here asserted, said:

> "While, at first, there seems merit in the argument, it is evident that, as has been indicated, the liability is not necessarily created by the voluntary assumption of contingent liability, but because the law requires such liability to exist in every policy contract. The contract is, therefore, merely used to identify the defendant as a member of a class subject to assessment of such contingent liability. It is evident that the defendant is so liable. Such identification could be established otherwise, and is admitted by the defendant in his answer and cross petition" (here admitted by demurrer).

ents, specifically ruling that the laws of Georgia, and not the laws of New York, controlled, and that persons receiving policies from a mutual insurance corporation **did not become members thereof, though under the provisions of the New York law they would be members.**

Having found that the respondents were not members, the Court below found that the judgments in the New York proceedings could not be enforced against Georgia residents **without violating their constitutional rights to a day in court.**

## III.

## SUMMARY STATEMENT OF PLEADINGS.

Petitioner is the Superintendent of Insurance of the State of New York and statutory successor of insolvent insurance corporations chartered in that State. On the 13th day of October, 1939, he filed a bill in equity in the Superior Court of Fulton County, naming as defendants certain individuals and corporations, alleging them to be members and policyholders of Auto Mutual Indemnity Company (R. 7 to 18).

He alleged that the Company, by its charter, was authorized to issue casualty policies on a mutual plan only; that the applicable statutes of New York contained mandatory provisions conining membership of the corporation to its policyholders; that mutual insurance companies of this character must provide in their charters and by-laws for the levy of an assessment in case of deficiency of assets, and that every member is obligated to pay assessments not exceeding twice the amount of his annual premium, upon receiving notice thereof.

He alleged further that after the Company had been taken over for liquidation under a judgment of the New

York Supreme Court, his recommendation for the levy of a 40 per cent assessment against all members and policyholders had been approved by the Court; that thereafter he had computed the amounts due by each member, including the Georgia defendants, also other indebtedness due for premiums.

His second report containing a computation of the amount due by each defendant under the assessment and other indebtedness due was filed in the case and on November 18, 1938, a Justice of the Supreme Court of New York entered a decree finding that notice had been mailed to the last known address of the members shown on the books of the insurer and newspaper publication had also been made, all as provided for in the statutes of New York dealing with the liquidation of insolvent mutual insurance companies, and approving the correctness of the reports aforesaid (R. 38).

Relevant sections of New York law covering the liquidation of insolvent insurance companies and assessments therein were attached as exhibits to the pleadings (Amendment of July 25, 1940 [R. 18-44, inclusive], and Amendment of August 14, 1940 [R. 44-46]). The charter (Article 4) provided that "the members of the corporation shall be the policyholders therein." And in the same pleadings (Amendment of July 25, 1940 [R. 22-23], petitioner alleged the law of New York to be:

> "It is the law of New York that every person who accepts a policy of insurance in a mutual insurance company thereby becomes a member thereof. • • •
>
> "It is the law of New York that the aforesaid section 346 compels the Company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed

in accordance with Section 346 of the New York Insurance Law. • • •

"It is the law of New York that the laws of that state govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that state."

And that "Every person who was a member of a mutual insurance company at any time within the twelve months prior to the date of the commencement of • • • liquidation proceedings • • • is liable to assessment in accordance with Section 346 of the New York Insurance Law."

The New York proceedings are summarized in the report of the Referee (14 N. Y. Supp. [2] 601). This opinion is annexed to the brief filed with the petition for certiorari.

All policies contain the standard clause entitling persons obtaining judgments against the insured to proceed against the insurance company under the terms of the policy to the same extent as the insured (R. 48A). The **names of many defendants indicate their business as public carriers.** By the statutes of Georgia and other states in which they did business, as well as by the provisions of the Interstate Commerce Act, the filing of their policies was a condition to the exercise of their certificates of public convenience. Against these policies the public has a direct right of action.

The mutual nature of the company appears from its name, from the profit-sharing provisions in the face of the policy, and on the back of the policy is a specific recitation that "The Insured is hereby notified that by virtue of this Policy he is a member • • • entitled to vote • • • at any and all meetings of said company," and that "The contingent liability of the named Insured under this policy shall be limited to one year from the expiration or cancel-

lation hereof and shall not exceed the limit provided by the Insurance Law of the State of New York."

Defendants moved generally to dismiss the bill because (a) it appeared that the policies had been delivered in Georgia, and (b) because the policies contained no provisions on their face for assessment nor reference to the by-laws. Although these defenses challenge presently their right to recover assessments and inferentially admitted the liability for premiums, the Court sustained the demurrer and dismissed the entire bill (R. 80-81). The Supreme Court of Georgia affirmed with opinion (R. 82-96). Although the right to recover premiums was insisted upon (R. 98) a rehearing was denied generally without opinion (R. 107).

The Supreme Court of Georgia construed petitioner's allegations that the defendants were policyholders and members as an averment that defendants were members because they were policyholders. Finding that the policies were delivered in Georgia, **the Court ruled inapplicable the statutes of New York and the orders and decrees in the liquidation proceedings.**

It concluded that the acceptance of the policy did not make a policyholder a member liable to assessment in accordance with the laws of the state of the company's domicile, although a reference to this liability appeared on the back of the policy "there being in the face of the policy no reference to any contingent liability or assessment, or to any law providing for such," and that this was true notwithstanding the charter of the company "provides that members shall be the policyholders, that its by-laws provide that every member shall be liable to assessment, and that the insurance law of the State of the Company's domicile contains a like provision."

**It concluded that Georgia residents were not bound by**

**the liquidation proceedings in New York** because they had not been personally served, but only by mail, pursuant to the New York statutes. It deemed the service on the corporation insufficient, and held that the **rulings of this Court that the rights of members of a mutual corporation must be determined by the single law of the domicile of** the corporation, **were applicable only to fraternal orders** having a lodge system and not applicable here, and that only Georgia law would be applied (R. 82).

**It considered** the **contention** advanced by petitioner **that his rights** to collect a fund for the payment of creditors, based upon assessments authorized by the statutes of New York and confirmed by the judgments of its courts, **were protected by the full faith and credit clause of the Federal Constitution** (Article 4, Section 1), **and denied it** (R. 87-90).

Finally, **it concluded that the rights of the defendants, under the Fourteenth Amendment** of the Constitution of the United States, **prevented enforcement of assessment rights based upon the statutes of New York** and a charter granted thereunder (R. 89-90).

## IV.

## FEDERAL QUESTIONS WHICH WILL BE URGED IN THIS COURT.

1. The statutes under which the Auto Mutual Indemnity Company was incorporated, its charter and by-laws, were not accorded the full faith and credit to which they were entitled under Article IV, Section 1, of the Constitution of the United States.

2. The judgment dismissing the petition and the opinion of the Supreme Court of Georgia denying all relief to a statutory liquidator of an insolvent mutual insurance com-

pany, chartered under the laws of New York, who sues to recover a balance of premiums admittedly due, and assessments levied in accordance with the statutes and charter provisions, is a violation of the rights guaranteed to him under the full faith and credit provision of the Constitution of the United States, Article IV, Section 1, and of the Fourteenth Amendment.

3. Refusal to accord recognition to the orders and decrees of the Supreme Court of New York, entered in the liquidation proceedings, entitled "**In re Auto Mutual Indemnity Company,** 14 N. Y. Supp. (2) 601," which adjudged the necessity for assessment and specifically adjudicated the liability to assessment of policyholders holding policies identical to those of the defendants residing in Georgia, is a denial of the full faith and credit due to the judgments of a sister State, guaranteed by Article IV, Section 1, of the Constitution of the United States aforesaid.

4. The orders and decrees of the domiciliary court approving the assessment, dated February 7, 1938 (R. 8, paragraph 6 original petition); the decree overruling exceptions by residents of South Carolina to the assessment on the ground that the policies contained no provision for assessment (being the identical policies involved here), and the order of the Supreme Court of New York, dated August 12, 1938 (R. 8, paragraph 8 original petition), approving assessments against all policyholders whose policies were similar to the typical policy in the record (R. 47), which included all of the defendants, were adjudications of the liability to assessment of policyholders of this class. In holding that Georgia policyholders were not liable to assessment, the Court denied full faith and credit to the judgments aforesaid.

V.

## SUMMARY OF ARGUMENT

**Whether the liability of the defendants shall be measured by the laws of New York or the laws of Georgia raises a federal question.**

Hancock National Bank v. Farnum, 176 U. S. 640;
Adam v. Saenger, 303 U. S. 59, 64;
Constitution of the United States, Section 1, Article IV;
Sovereign Camp W. O. W. v. Bolin, 305 U. S. 65.

**The laws of the state where the corporation was chartered control the rights and liabilities of the stockholders and members.**

Supreme Council of Royal Arcanum v. Green, 237 U. S. 531;
Sovereign Camp W. O. W. v. Bolin, supra;
Chandler v. Peketz, 297 U. S. 609;
Hartford Steam Boiler Co. v. Harrison, 301 U. S. 459, 464;
Taggart, Insurance Commissioner, v. Wachter, Hoskins & Russell, Inc., 21 Atl. Reporter (2) 141;
Pink, Supt., v. Aaron et al., 13 S. E. (2) 489;
Pink, Supt., v. Town Taxi Co., Inc., 21 Atl. (2) 656.

**The laws of New York, under which the corporation was chartered, impose a contingent liability on all policyholders.**

Factory Mutual Liability Ins. Co. v. Behan, 253 N. Y. S. 562, 564;
Behn v. Weinstock, 247 N. Y. 221, 160 N. E. 17.

**The contingent liability imposed by New York law is property in which creditors have a vested right.**

Corning v. McCullough, 1 Comstock 47, 49 Am. Dec. 287, 290;
Coombes v. Getz, 285 U. S. 434, 448.

**Liability to assessment arises from the voluntary action of the policyholder and the burden imposed by statute.**

Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301,

cited with approval by this Court in **Bernheimer v. Converse**, 206 U. S. 615.

Concord First National Bank v. Hawkins, 174 U. S. 364, 372;
Beha v. Weinstock, 247 N. Y. 221, 160 N. E. 17;
Mutual Insurance Co. v. Korn, 7 Cranch. 396;
Modern Woodmen v. Mixer, 267 U. S. 544;
In re Auto Mutual Indemnity Company, 14 N. Y. S. (2) 601.[1]

**Respondents, as public carriers, sustain a liability direct to the public.**

Merchants Mutual Ins. Co. v. Smart, 267 U. S. 129;
Blashfield's Automobile Laws, Vol. 1, p. 131.

**Provisions of insurance law made mandatory by statutory requirement are read into the policies if omitted.**

Bakker v. Aetna Life Ins. Co., 264 N. Y. 150, 190 N. E. 327;
Newton v. Employers Liability Assurance Corporation, 107 Fed. (2) 164;
National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71;
Merchants Mutual Ins. Co. v. Smart, supra;
Fire Asso. of Philadelphia v. New York, 119 U. S. 110;
Cogliano v. Ferguson, 139 N. E. 527;
Southern Surety Co. v. Chambers, 115 Ohio St. 434, 154 N. E. 786, 787.

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[1] The complete text of this opinion appears as an exhibit to the brief accompanying the petition for certiorari in this court.

**In denying to petitioner the right to recover premiums admittedly due, the judgment deprived him of rights guaranteed by the Constitution of the United States.**

Relfe v. Rundle, 103 U. S. 222;
Clark v. Williard, 292 U. S. 112, 129;
Broderick v. Rosner, 294 U. S. 629;
Coombes v. Getz, supra, 285 U. S. 434.

**Residents of Georgia received notice of and were bound by the New York proceedings.**

Milliken v. Meyer, No. 66, October Term, 1940, 85 L. ed. 269, 272;
Bernheimer v. Converse, supra, 206 U. S. 516;
Taggart, Ins. Commissioner, v. Wachter, Hoskins, Russell, Inc., 21 Atl. (2) 141;
Marin v. Augedahl, 247 U. S. 142.

**The assessment recommended by the liquidator, having been approved by the Court, became res adjudicata against all defendants.**

Broderick v. Rosner, supra, 294 U. S. 629;
Chandler v. Peketz, supra, 297 U. S. 609;
Marin v. Augedahl, 247 U. S. 142;
Hancock National Bank v. Farnum, supra, 176 U. S. 640, 644.

**By application of the laws of Georgia instead of the laws of New York and the decisions of its courts, petitioner was deprived of constitutional rights duly asserted.**

Conclusion of Brief, p. 49;
Motion for Rehearing in Georgia Supreme Court (R. 98, 99, 100, 101) (R. 106, 107);
Sovereign Camp W. O. W. v. Bolin, supra, 305 U. S. 65.

## VI.

## BRIEF AND ARGUMENT.

### JURISDICTION OF THE COURT.

Federal questions were seasonably asserted[2] and distinctly passed upon. The Supreme Court of Georgia thus summarized them below (R. 90):

> "Counsel for the plaintiff take the position that to deny the element of conclusiveness to the decree of the New York Court upon the question of liability of each of the defendants to assessment would be to refuse to give effect to the full faith and credit clause of the Constitution of the United States. The answer to that contention is, that before that constitutional provision can become operative one must have had his day in court; and over against it we place the other guaranty, to wit, the due-process clause; and it is of the essence of due process that one must be given an opportunity to be heard."

In **Hancock National Bank v. Farnum**, 176 U. S. 640, 642, 44 L. ed. 619-620, this Court said:

"The plaintiff's contention that these federal pro-

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[2] Throughout his petition (R. 7-20) petitioner relied upon the statutes of New York (R. 8, 9, paragraphs 5, 10, 13; R. 20, paragraphs 1, 2; R. 21 to 30, inclusive) and the judgments of its courts (R. 7, paragraphs 3, 4, 6, 8, 9, and R. 20, paragraphs 5, 7, 8; R. 30, Exhibit C; R. 32, Exhibit D; R. 34, Exhibit E; R. 35, 37, 40, Exhibit G), and by amendment [R. 44 (2)] he pleaded additional provisions of the New York statute.

The trial court in sustaining the demurrer and dismissing the case did so because the "petition fails to make out a case of liability for assessment" (R. 81), but supplemented this judgment on August 23, 1940, by overruling all other defenses except the one above asserted.

The defendants asserted that they were bound "only by the laws of the State of Georgia" (R. 51); that the insurance laws of New York were irrelevant [R. 52 (4); R. 54 (4)]; that they were not bound by the orders made in the New York courts (R. 60, paragraphs 3, 5); that the laws of Georgia were applicable and the New York laws were not (R. 61-62, paragraphs 7, 8), and that the judgments of the New York courts were void under named amendments to the Constitution of the United States [R. 62, 63; also R. 67, 69, 70 (5), 71 (8)].

A respondent (R. 74) challenges the sufficiency of the New York statutes to bind him [R. 76 (9-b)] and contended that the policies were ordinary insurance contracts, containing no reference to the laws of New York. Another respondent (R. 77, 79) urged similar defenses.

visions required a decision different from that made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear."

And in **Adam v. Saenger**, 303 U. S. 59-64, 82 L. Ed. 649, at 652, the Court said:

"Whether the question be regarded as one of fact or more precisely and accurately as a question of law to be determined as are other questions of law, * * * it is one arising under the Constitution and a statute of the United States which commands that such faith and credit shall be given by every court to the California proceedings 'as they have by law or usage' of that state. And since the existence of the federal right turns on the meaning and effect of the California (New York) statute, the decision of the Texas (Georgia) court on that point, whether of law or of fact, is reviewable here."

**Section 1, Article IV**, of the Constitution of the United States provides:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The effect of the congressional declaration provided for in the foregoing constitutional provision is well summarized in **Hancock National Bank v. Farnum**, supra, 176 U. S. 640, 642:

"Such is the congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the **local effect must be recognized everywhere** through the United States."

The controlling question in the case is whether the rights of petitioner and the liabilities of the respondents shall be determined by the laws of Georgia or the laws of New York. This raises a federal question, usually examined by this Court on certiorari. An identical case is **Sovereign Camp W. O. W. v. Bolin,** supra, 305 U. S. 65.

THE LAWS OF THE STATE WHERE THE CORPORATION WAS CHARTERED CONTROL THE RIGHTS AND LIABILITIES OF THE STOCKHOLDERS AND MEMBERS.

This case is controlled by recent precedents in this Court. In many respects the pleadings in the case are identical with the pleadings involved in **Supreme Council of Royal Arcanum v. Green**, 237 U. S. 531, 59 L. ed. 1089; **Sovereign Camp Woodmen of the World v. Bolin,** 305 U. S. 65, 83 L. ed. 45, and **Chandler v. Peketz,** 297 U. S. 609, 80 L. ed. 881.

As was pointed out by this Court in **Royal Arcanum v. Green,** supra (l. cit. 545):

> "* * * the settled principles * * * applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that state."

The errors here assigned, being of a similar nature, we will discuss the applicable principles by an examination of the three cases cited above.

Paraphrasing somewhat the language of the Georgia Supreme Court, the first premise on which its decision is based (Opinion of Court, R. 82 [4]) is:

Liability to assessment of persons holding policies in a

mutual company chartered by the laws of New York will be determined by the laws of Georgia and not of New York.

But this Court, in **Royal Arcanum v. Green**, supra, held the contrary. It said (l. cit. 542):

> "Moreover, as the charter was a Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that state, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws."

Laying to one side for the moment the reasons which justified the rulings of the Court we proceed to the rule itself:

> "In fact, while dealing with various forms of controversy, in substance all these cases come at last to the principle so admirably stated by Chief Justice Marshall more than a hundred years ago (Head v. Providence Ins. Co., 2 Cranch. 127, 167, 2 L. ed. 229, 242) as follows: 'Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers.'
>
> "In addition it was by the application of the same principle that a line of decisions in this court came to establish; first, that the law of the state by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, that the state law and proceedings are binding

as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected."

**Royal Arcanum v. Green**, supra (l. cit. 544).

The Georgia Supreme Court refused to follow the principles announced in **Royal Arcanum v. Green** because the decision there involved a fraternal order having a ritualistic system.[3] But that decision was based upon principles established more than one hundred years ago. These principles do not depend upon rituals or uniforms. The doctrine is equally applicable to a mutual insurance company, because the relationship of a policyholder to a mutual insurance company is analogous to the relationship of a member of a fraternal organization to his society.

As this Court clearly pointed out in **Mutual Life Insurance Co. v. Phinney**, 178 U. S. 327, at 344:

"The contract of insurance is a peculiar contract, especially when made with a mutual insurance company, for, although in terms a contract with a corporation, it is in substance a contract between the insured and all other members of that company."

The doctrines established in the **Royal Arcanum** case, supra, are applicable here, and that they are conclusive is beyond dispute.

"That they are applicable clearly results from the fact that although the issues here presented as to things which are accidental are different from those which were presented in the cases referred to, as to every essential consideration involved the cases are the same and the controversy here presented is and has been, therefore, long since foreclosed."

**Royal Arcanum v. Green**, supra (L. Cit. 544).

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[3] [R. 83 (5)] "* * * acceptance of a policy of * * * insurance issued * * * by a company that bears the name 'mutual,' but is not shown to have a lodge system with ritualistic form of work * * * does not make the policyholder a member liable to assessment. * * *."

UNLESS THE LAWS OF THE INCORPORATING STATE PROVIDE THE CONTRARY IT IS ONE OF THE ATTRIBUTES OF MUTUAL INSURANCE THAT THE POLICYHOLDERS SHALL BE THE MEMBERS.

The rule is announced in **29 Am. Jur., "Insurance,"** p. 88, Sec. 56:

> "Generally speaking, the members of a mutual insurance company are its policyholders."

And this principle has often been announced by this Court.

In **Hartford Steam Boiler Co. v. Harrison,** 301 U. S. 459, 464, this Court said:

> "The policyholders are the owners of the company and constitute its membership."

To the same effect is **Duffy v. Mutual Benefit Life Ins. Co.,** 272 U. S. 613, 71 L. ed. 439.

Recent state court decisions, premised upon pronouncements of this Court, are in accord with the contentions here advanced.

Lloyd, Supt., v. Cincinnati Checker Cab Co., ... Ohio ..., 36 N. E. (2) 67, supra;

Taggart, Ins. Commissioner, v. Wachter, Hoskins & Russell, Inc. (Maryland), 21 Atlantic Reporter (2) 141;

Pink, Supt., v. T. B. Aaron et al. (South Carolina), 13 S. E. (2) 489;

Pink, Supt., v. Town Taxi Company, Inc. (Maine), 21 Atlantic (2) 656 (decided August 11, 1941).

The last two cases dealt with the same assessment that is involved in this case. In each of these cases, as well as in the Maryland case, we have examined the briefs filed by the insured persons and we find citation and strong reliance upon the decision of the Supreme Court of Georgia here under review. It will be noted, however,

that these courts of review not only declined to consider the Georgia case as a persuasive authority, but they did not even cite it.

In measuring the liability of the respondents the Georgia Supreme Court [R. 82 (4)] said:

> "If liable at all, the defendants are so only because their contracts constituted them members of the corporation. Whether or not these made them personally liable for the assessments **will be determined by the law of this State** when such liability is asserted against them in the courts of this State." (Emphasis ours.)

In determining this question the Supreme Court of Georgia confined its inquiry of liability to the insurance policies themselves (R. 93-95), totally ignoring the mutual nature of the company and the liability arising therefrom. It said (R. 93):

> "This involves a proper construction of the contract; that is, what is its legal import? In ascertaining this, the law of what state shall be applied?"

The Court concluded that the laws of Georgia should be applied (R. 94).

A comparison of the reasoning which led the Supreme Court of Georgia to the conclusion announced with the reasoning of the Supreme Court of Missouri in **Bolin v. Sovereign Camp W. O. W.**, 112 S. W. (2) 582, demonstrates quite[4] clearly that the Supreme Court of Georgia delib-

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[4] That the Supreme Court of Georgia intentionally bottomed its opinion upon the doctrine repudiated by this Court in the **Green case** and the **Bolin case**, supra, clearly appears from its citation of **McClement v. Supreme Court, I. O. F.**, 152 N. Y. S. 136, and **Lee v. Missouri State Life Ins. Co.**, 238 S. W. 858, as authority for its position. These cases were overruled by name. The Court of Appeals of New York reversed the **McClement case** (222 N. Y. 470, 119 N. E. 99) on the authority of **Royal Arcanum v. Green**, and the Supreme Court of Missouri reversed the **Lee case** upon the same principle (l. cit. 261 S. W. 85), holding:

> "The persuasive fact is evident that this association was created to conduct a life insurance business on the assessment plan. It was incorporated under a statute limited by its terms to insurance of that character. * * * It is not material that the word 'assessment' was not used in the certificate."

erately selected as the applicable rule the principles overruled by this Court in the **Bolin case**. Short citations make this clear.

In the **Bolin case**, supra, the Supreme Court of Missouri (112 S. W. [2] 582, at ...) said:

> "The certificate must be regarded as a contract of general or old line insurance. This conclusion is not altered by the nature of the society granting the insurance because of the character of the insurance, so far as Missouri is concerned, depends on the terms of the contract only. Whatever may be the character of the petitioner in the eye of the Nebraska law it need not have the same character in Missouri. Whether it is a fraternal beneficiary society when sued in Missouri is a question of local law."[5]

But the Georgia Supreme Court was no more at liberty to depart from the principles established in **Royal Arcanum v. Green**, supra, than was the Missouri Court, and in reversing the Missouri Court's ruling in the **Bolin case** this Court [305 U. S. 66, l. cit. 75 (2)] said:

> "The beneficiary certificate (here a contract of mutual insurance) was not a mere contract to be construed and enforced according to the laws of the state where it was delivered. Entry into membership of an incorporated beneficiary society (mutual association) is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation. Another state, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicil."

And as this Court concluded (l. cit. 78):

> "The court below was not at liberty to disregard the fundamental law of the petitioner and turn a mem-

[5] Quoted from the opinion of this Court in **Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 66, l. cit. 74.

bership beneficiary certificate (mutual insurance policy) into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of ultra vires contracts (law of the forum) was to be applied as if the petitioner were a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of such associations are governed by the definition of the society's powers by the courts of its domicil."

Reduced to its last analysis, the decision of the Supreme Court of Georgia rests on the theory that the policy of insurance contains no provision for assessment and plaintiff has pleaded no other promise of the defendants to be liable for such assessment (R. 966). We will examine these conclusions in their order.

The failure to include in the contract an agreement assuming the assessment would surely not be more binding than a direct agreement relieving the stockholder or policyholder from assessment. It has long been established in this Court that when insolvency has ensued and the rights of creditors have intervened, **any agreement relieving the member from liability is void.**

In **Sanger v. Upton**, 91 U. S. 56, 23 L. ed. 220, this Court said:

> "It may, perhaps, be well doubted whether the stockholders would have voluntarily imposed such a burden upon themselves. The law does not permit the rights of creditors to be subjected to such a test. It would be contrary to the plainest principles of reason and justice, to make payment by the debtor for such a purpose in anywise dependent upon his own choice. * * *"

It is true that the Court there was dealing with the capital stock of an incorporated insurance company, but

the liability to assessment is the substitute for the capital stock.

Among the cases cited as authority in the **Sanger case** is **Salmon v. Hamborough Co.**, decided by an English Court in 1670. There an association of cloth merchants, operating under a charter which contained provisions for the assessment upon the cloth dealt with, faced the necessity of raising additional funds with which to pay an outstanding debt. The Chancellor sustained the charter power of assessment and directed the collection of the necessary funds.

THE PRINCIPLE OF LIABILITY TO ASSESSMENT ARISING FROM CHARTER PROVISIONS IS EQUALLY APPLICABLE TO MUTUAL INSURANCE ASSOCIATIONS.

> "While the rule may have been applied more often in actions against stockholders where double liability, for instance, is sought and in actions against members of fraternal benefit companies, we see no controlling distinction between those cases and one, as here, to recover an assessment against a member of a mutual company. 48 A. L. R. 674 et seq."
>
> **Pink, Supt., v. Town Taxi Company, Inc.**, 21 Atl. (2) 656 (Decided Aug. 11, 1941);
> **Lloyd, Supt., v. Cincinnati Checker Cab Co.**, supra, 36 N. E. (2) 67.

The cases decided by this Court, supporting this principle, are not confined to such fraternal order cases as the **Green case** and the **Bolin case**, supra. **Marin v. Augedahl**, 247 U. S. 142, 62 L. ed. 1038, involved stockholders of a baking company. **Great Western Telegraph Co. v. Purdy**, 162 U. S. 329, 40 L. ed. 986, involved a telegraph corporation. **Broderick v. Rosner**, 294 U. S. 629, 79 L. ed. 1100, involved a banking company, and the various actions in

which **Converse** was a party involved a farm equipment company. (See **Berhneimer v. Converse**, 206 U. S. 516, and other cases arising out of the same receivership, cited in Marin v. Augedahl, supra, l. cit. 247 U. S. 146.)

Indeed this Court, in the Green case, supra (l. cit. 542-543), points out that while the decisions of the state courts ruling the propositions for which we have been contending have been announced in cases involving fraternal associations (l. cit. 543), this Court finds that the principles announced by the state courts "come at last to the principle so admirably stated by Chief Justice Marshall in Head v. Providence Insurance Company, 2 Cranch. 127," and while adopting the principles above discussed in the **Green case**, which was itself a fraternal order case, the Court points out that "in addition it was by the application of the same principles that a line of decisions in this court came to establish * * * the applicability of the law of the domicile to assessment provisions and the force and effect of the judgments rendered in these courts." Citing cases involving corporations other than fraternal orders cited in the preceding paragraph.

The decision of the Georgia Supreme Court marks the only departure from the general rule. In **Restatement, Conflict of Laws**, Section 206, the rule is announced:

> "The existence and extent of the liability of a shareholder for assessments or to contribute to the corporation for the payment of debts of the corporation is determined by the law of the state of incorporation."

From the earliest decisions of this Court up to the present day this principle has prevailed. In **United States ex rel. Von Hoffman v. Quincy**, 4 Wall. 535, 550, 18 L. ed. 403, 408, this Court held that "the laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it as if they were expressly re-

ferred to or incorporated in its terms." The statutes of New York placing mandatory liability therefore became incorporated in the relationship between the insured and the mutual association.

While the origin of the liability is statutory, the liability is contractual, arising out of the statute. **Hathorn v. Calef**, 2 Wall. 10, 17 L. ed. 776; **Whitman v. National Bank**, 176 U. S. 559, 563, 44 L. ed. 587. And being contractual it is entitled to the constitutional guaranty against the impairment of contracts.

Excellent discussions of this principle by the State courts will be found in **Russell v. Berry**, 51 Mich. 287, 16 N. W. 651; **Commonwealth ex rel. Schnader v. Keystone Indemnity Company** (Penna.), 11 Atl. (2) 887, and **Taggart, Insurance Commissioner, v. Wachter, Hoskins & Russell, Inc.**, 21 Atl. (2) 141, decided July 15, 1941, the two cases last cited involving mutual insurance associations.

**Chandler v. Peketz**, 297 U. S. 609, is to the same effect, but as it deals more specifically with the binding quality of the order of assessment it will be discussed in a subsequent portion of this brief.

## THE LAWS OF NEW YORK, UNDER WHICH THE COMPANY WAS CHARTERED, IMPOSE A CONTINGENT LIABILITY ON ALL POLICYHOLDERS.

The relevant laws of New York, set forth in the pleadings (R. 23) and admitted by demurrer, are as follows:

> "b. It is the law of New York that the aforesaid section 346 compels the company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed in accordance with section 346 of the New York insurance law.

"c. It is the law of New York that every person who was a member of a mutual insurance company at any time within the twelve months prior to the date of the commencement of the rehabilitation or liquidation proceedings against the company is liable to assessment in accordance with section 346 of the New York insurance law.

"d. It is the law of New York that the laws of that State govern he rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that State."

By **law and usage in the courts of New York** the **mandatory provisions of these statutes have been uniformly sustained.**[1]

"Mutual automobile liability insurance companies of this State (New York) must issue assessable policies in every state in which they transact business."

**Factory Mutual Liability Ins. Co. v. Behan, Acting Supt. of Insurance,** 253 N. Y. S. 562, 564.

Other states which, by their charters, are authorized to issue nonassessable policies upon the maintenance of fixed guaranty fund, "confine its (their) New York business to the issuance of assessable policies only."

**Factory Mutual v. Behan,** supra.

In **Beha v. Weinstock,** 247 N. Y. 221, 160 N. E. 17, the highest court of New York, in dealing with an assessment of the identical nature here involved, said:

"* * * The defendant knew, when he entered the mutual company, that assessments could be levied up to twice his premium for the purpose of paying the losses. To the extent of this superadded liability, he became an insurer. * * * The main thing is that the debts and liabilities are fixed as of a certain date and **a policyholder made liable by the statute for these debts** up to a certain amount." (Emphasis ours.)

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[1] Statutory restrictions prohibiting non-assessable policies followed the company "into every jurisdiction where it undertook to contract." **Sliosberg v. New York Ins. Co.,** 155 N. E. 748, 753.

A change in the insurance laws of New York was necessary before mutual casualty companies possessed the corporate power to issue non-assessable policies and this will not become effective until June 15, 1942. (Chap. 28, Consolidated Laws, Sec. 58), adopted June 15, 1939.

In the report of the Referee in the domiciliary case (In re Auto Mutual Indemnity Company, 14 N. Y. S. [2] 601, Exhibit A to brief of petitioner in certiorari, filed in this court) a full discussion of this subject will be found.

By their demurrers the respondents admitted the provisions of the New York law aforesaid. The pleadings clearly alleged the integration of the New York laws in the policies of the respondents, and under the laws of Georgia the demurrer admits all properly pleaded allegations.

**Code of Georgia 1933, Section 81-304,** provides:

> "A demurrer denies the right to the relief sought, in whole or in part, admitting all properly pleaded allegations in the petition to be true."

Under the laws of New York the **power of the Company to issue insurance** at all **was limited to the issuance of assessable policies.** In determining its powers elsewhere resort must be had to the incorporating act.

> **Head & Amory v. The Providence Ins. Co.,** 2 Cranch 127,

cited in **Royal Arcanum v. Green,** supra (page 16, this brief).

CONSENT IS NOT NECESSARY TO CREATE LIABILITY ARISING OUT OF THE STATUTE.

The Supreme Court of Georgia relieved its residents from liability by holding (R. 90):

> "A person cannot be made a member or stockholder of a corporation without his consent."

As we have previously asserted in this brief, this consent need not be evidenced by a direct agreement. It may arise from the conduct of the defendant in accepting stock in a banking corporation, or a policy in a mutual insurance company.

In **Howarth v. Lombard**, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, cited with approval by this Court in **Bernheimer v. Converse**, 206 U. S. 615, 51 L. Ed. 1163, the Massachusetts Supreme Judicial Court made an excellent analysis of the principles underlying this liability. This was an action by the Receiver of a bank incorporated in the state of Washington, against persons residing in Massachusetts. That Court, in determining the basis upon which rests this liability, said:

> "It is not the statute which directly and proximately creates the liability. It is the voluntary action of the stockholders under the statute, followed by action of creditors which is founded on the action of the stockholders. * * * The stockholders subscribed for their stock with full knowledge of the statute, and they must be held impliedly to have agreed to be bound by it. The statute enters into and forms a part of their undertaking as stockholders, and their implied agreements in that relation conform to it. It is to be noticed, under this statute, that stockholders, merely by subscribing for stock, **without any express promise to pay for it**, are bound, in all corporations to pay the amount of their unpaid subscriptions, if needed, and in banking corporations to pay as much more, if it is called for, to satisfy creditors * * *.
>
> "Although the liability is founded on a statute, there is a contractual element entering into it. **The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions** to the corporation when needed, and should pay **the additional sum to create a fund for creditors if the corporation should become insolvent**, and a receiver should be appointed to collect it. * * * such an obligation is quasi ex contractu." (Emphasis Ours.)

And that Court, citing **Concord First National Bank v.**

**Hawkins**, 174 U. S. 364, 372, 43 L. ed. 1007-1011, 19 Supreme Court Reporter 742, where Mr. Justice Shiras says:

> "Undoubtedly the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But, **as the ownership of the stock in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.**"

That such an obligation cannot be discharged by agreement nor impaired by statute clearly appears from the other authorities cited in **Howarth v. Lombard**, supra.

The Courts of New York have uniformly followed this rule. An excellent discussion appears in the report of the Referee (Exhibit "A" to brief filed with petition for certiorari).

THE LIABILITY TO ASSESSMENT, AS DETERMINED BY THE LAW OF THE DOMICILE, MUST BE ENFORCED THOUGH THE LAWS OF THE FORUM WOULD MAKE THE CONTRACT VOID. We quote briefly from the leading cases:

In **Christopher v. Norvell**, 201 U. S. 216, 50 L. Ed. 732, this Court said:

> "The right to be a stockholder is given her by the law of the state where she resides and her *right and liability* as such are provided by the acts of Congress." (Italics by the court.)

And in **Smathers v. Bank**, 71 S. E., at 346, the Court said:

> "This liability is not contractual on the part of the stockholder, but is statutory and imposed for the benefit of creditors, and hence a married woman, when she becomes the owner of the stock, assumes the same liability as all other stockholders."

In **Beha v. Weinstock**, supra (247 N. Y. 221), 160 N. E. 17, at 18, the Court of Appeals of New York was dealing with an assessment against members of a mutual casualty insurance company. It said:

> "This was a mutual insurance company in which the insured was also the insurer. The only funds to pay insurance losses came from the premiums or assessments. Persons other than the insured were interested in maintaining a sufficient insurance fund to pay losses. By section 109 of the Insurance Law the company was directly liable in case of the insolvency of the insured to persons injured in an accident covered by the policy.
>
> "Section 346 provided for a fund to pay losses. First, there was the premium stated in the policy. Then the contingent mutual liability of the members for the payment of losses in excess of its cash funds was provided by assessments, not to be less than an amount equal to twice the amount of, and in addition to, the cash premium written in the policy. * * * The defendant knew, when he entered the mutual company, that assessments could be levied up to twice his premium for the purpose of paying losses. To the extent of this superadded liability, he became an insurer. * * * The main thing is that the debts and liabilities are fixed as of a certain date and **a policyholder made liable by the statute for these debts** up to a certain amount." (Emphasis ours.)

UNDER THE LAWS OF NEW YORK THE CONTINGENT LIABILITY OF STOCKHOLDERS (POLICYHOLDERS) IS PROPERTY IN WHICH CREDITORS HAVE A VESTED RIGHT.

> **Corning v. McCullough**, 1 Comstock 47, 49 Am. Dec. 287, 290.

The liability imposed in the **Corning case** is in many respects identical to the liability here involved. Speaking of the liability of the stockholders to contribute a sufficient

fund to pay corporate debts the Court of Appeals of New York said (l. cit. 49 Am. Dec. 291):

> "This liability the stockholders voluntarily assumed, and it could not have been misunderstood by them. It is fully and clearly expressed in the act of incorporation. * * * It is a liability which every stockholder must be understood to assume and take upon himself and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust, as well **to the personal liability of the stockholders**, as to the responsibility of the corporation, for the fulfillment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated." (Emphasis ours.)

Further, at 294, the Court said:

> "It is virtually and in effect a liability upon a contract, and the mutual agreement of the parties; not indeed in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties.
>
> "The personal liability of the stockholders * * * was one of the terms of purchase authorized by the statute. * * * It was consequently one of the terms of the sale by the plaintiff (creditors) to the company and constituted part of their security for * * * the debt. To those terms and security * * * the stockholder * * * gave his assent and made himself a party under and according to the provisions of the charter and the plaintiffs (creditors) * * * entitled themselves to the benefit of the personal liability of the defendant as a stockholder."

That policyholders in mutual companies have knowledge of its by-laws has long been the rule in this court.

In **Mutual Assurance Co. v. Korn**, 7 Cranch. 396, 3 L. ed. 383, this court said:

> "One insured in a mutual company becomes a member thereof and is presumed to have knowledge of and is bound by the provisions of the charter, by-laws and rules of the company."

And this has been the established rule in New York for many years.

Those who contract with corporations of this kind do so "with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation." **People v. Globe Mutual Life Ins. Co.**, 91 N. Y. 174, 179; **People v. Security Life Ins. & Annuity Co.**, 78 N. Y. 115, 34 Am. Rep. 522, cited by the Court of Appeals of New York in **People v. American Loan & Trust Company**, 172 N. Y. 31, 65 N. E. 200.

And this knowledge is not confined to residents of New York. All policyholders become members of the Company and their status as policyholders is in New York.

> "It does not matter that a member joined in another state."
>
> **Modern Woodmen v. Mixer**, 267 U. S. 544, at 551.

In **Canada Southern Railroad Co. v. Gebhard**, 109 U. S. 527 (l. cit. 537), this Court said:

> "A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (Bank of Augusta v. Earle, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. Railroad v. Koontz, 104 U. S. 12. But, wherever it goes for business it carries its charter, as that is the law of its existence (Relfe v. Rundle, 103 U. S. 226), and the charter is the same abroad that it is at home. * * * whatever legislative control it is subjected to at home must be

> recognized and submitted to by those who deal with it elsewhere. * * * if admitted, it must, * * * be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

By becoming insured in a mutual company each policyholder "created against himself a contractual liability in the nature of a suretyship. * * * Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428, and cases cited in connection therewith, supra) that, upon the facts here disclosed, **a contractual obligation arose**; and **the right to enforce it, having become vested, comes within the protection of both the contract impairment clause** in Art. I, Sec. 10, and the **due process of law clause** in the Fourteenth Amendment, of the federal constitution." **Coombes v. Getz**, 285 U. S. 434, 448, 76 L. ed. 866, 875.

Such a liability could not have been avoided by contract. In **Upton v. Tribilcock**, 91 U. S. 45, 23 L. ed. 203, this Court held:

> "A contract between a company or its agents and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the company, and as to the rights of the assignee who represents the creditors."

MANY OF THE DEFENDANTS, BEING PUBLIC CARRIERS, INCURRED LIABILITY TO THE PUBLIC BY FILING POLICIES ISSUED BY THE COMPANY WITH THE INTERSTATE COMMERCE COMMISSION AND VARIOUS PUBLIC SERVICE COMMISSIONS.

These requirements are set forth in detail in **Blashfield's Automobile Laws**, Vol. 1, p. 131, and were recently sustained by this Court.

**Merchants Mutual Ins. Co. v. Smart**, 267 U. S. 129, 69 L. ed. 542.

The assessments which petitioner seeks to collect will in a large part be paid to members of the public who have rights arising from the filing of these policies with the various public service commissions. The rights of persons entitled to protection by these provisions of law are absolute. Whatever defenses might be available between the policyholder and the company, if the rights of creditors were not present, is not material. We are now dealing with the action brought by a liquidator to collect the funds with which he may pay claims of creditors. **As against claims of this nature all policyholders, including the Georgia defendants, are estopped to deny liability provided for by law.**

Where the claims arise from property destroyed or injuries received in intrastate or interstate commerce the estoppel is clear.

**United States Casualty Co. v. Timmerman**, 180 Atl. 631;

**McLaughlin v. Central Surety & Ins. Corp.**, 166 Atl. 621.

In **Bolta Rubber Co. v. Lowell Trucking Corp.**, 25 N. E. (2) 973 (certiorari denied), the Court, dealing with the recent requirement of the Interstate Commerce Commission, held:

"The violation by truckers of requirement in policy * * * would not preclude shipper from enforcing for its own benefit the obligation of insurer to the extent of $1,000 under indorsement added to policy pursuant to regulations of Interstate Commerce Commission. 45 U. S. C. A., Sec. 315."

PROVISIONS OF INSURANCE LAW MADE MANDATORY BY STATUTORY REQUIREMENT ARE READ INTO THE POLICIES IF OMITTED.

The public has a right of action against the company under the terms of the policy "in the same manner and to the same extent as the insured" (conditions of policy, Sec. 6, R. 48).

"When the contract of insurance is made and the policy is issued it is made in contemplation of this law, which immediately becomes part of it. If this be not so, the door is open for fraud, subterfuge and deception. The insurance company may refuse the risk, refuse to issue its policy, but, once having done so, section 109 attaches to it, and the mere failure to recite this provision in the policy will not obviate its effect. If this be so, it stands to reason that no agreement between the insurance company and the insured can modify the law. The purpose of the provision is apparent. It is made for the benefit of persons injured or suffering damage and not solely for the benefit of the insured. * * *."

**Bakker v. Aetna Life Ins. Co.**, 264 N. Y. 150, 190 N. E. 327.

In **Newton v. Employers' Liability Assurance Corporatio**, 107 Fed. (2) 164, the Fourth Circuit Court of Appeals, examining the statutes of New York placing specific burdens against casualty companies, at page 167, says:

"It puts an end to the rule that a contract of liability insurance is to be regarded as one of indemnity only. * * * When the owner takes out a liability

policy, no matter how limited as to coverage, the provisions of section 109 are a part of the contract."

Quoting from **Bakker v. Aetna Life Ins. Co.**, supra, the court says:

> "The owner is not obliged to insure in all instances, nor is any insurance company obliged to issue a policy to everybody making application, but, **when the policy is once issued** and the risk assumed, **section 109** of the Insurance law **states specifically what this risk shall be.**"

In **National Union Fire Ins. Co. v. Wanberg**, 260 U. S. 71, 67 L. ed. 136-140, the Court considered a provision in the application for insurance contrary to the terms of the statute and disposed of it as follows:

> "It is clear that, **if the statute is valid, such a consent is void**, because it defeats the very object of the statute."

And in **Merchants Mutual Ins. Co. v. Smart**, supra, 267 U. S. 129, 69 L. ed. 538 (1), the Court held:

> "A state authorizing an insurance company to do business within its limits, may regulate its affairs, so far, at least, as to prevent it from committing wrongs or injustice in the exercise of its corporate functions."

Nor may the respondents escape liability because their policies contained no reference to assessment. As previously pointed out, such exemption from liability would not have been available had there been a direct agreement to that effect. Their rights are not impaired by the integration of the statute into their contracts; they were notified through the insurance provisions of the statutes of New York, of what would be required of them if they did business with a mutual company, and by accepting insurance from the company they assented to these terms.

**Fire Association of Philadelphia v. New York**, 119 U. S. 110, 30 L. ed. 342.

This is in accordance with the principles announced generally by the state courts and by this court. Some of the authorities will be noticed briefly.

In **Lorando v. Gethro**, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374, the Court holds that a statute providing that indemnity insurance policies shall not require payment of the loss by the insured as a condition to liability of the insurer, and that the injured person may look to the insurer for compensation, becomes a part of every insurance policy written in the state and the provisions in the contract to the contrary are void.

In **Cogliano v. Ferguson**, 139 N. E. Reporter 527, the same principle is recognized as follows:

> "The contract having been made with a foreign corporation, among its implied terms were the provisions of the statute under which it was organized, and could be dissolved, and its assets distributed among creditors."

There the court cites **Howarth v. Lombard**, supra, frequently cited in our briefs; **Bernheimer v. Converse**, supra, and **In re Empire State Surety Co.**, 214 N. Y. 553, 108 N. E. 825.

An excellent collection of the authorities will be found in **Southern Surety Co. v. Chambers**, 115 Ohio St. Rep. 434, 154 N. E. 786, 787.

The effect of the decision of the Court below was to deny to the records and judicial proceedings of New York such faith and credit "as they have by law or usage" in the courts of the state from which they are taken. There was a failure to extend to petitioner the protection to which he was entitled under Section 1, Article IV, of the Constitution of the United States, and the judgment must be reversed.

THE JUDGMENT DISMISSING THE CASE DEPRIVED PETITIONER OF THE RIGHT TO COLLECT PREMIUMS ADMITTEDLY DUE.

The court below gave no reason for this action. Believing that the court had overlooked these claims petitioner promptly filed his motion for rehearing [R. 98 (3)], in which he called attention to this oversight. The motion for rehearing was denied in its entirety without opinion, thereby relieving the defendants from admitted indebtedness.

This decision could not turn on the question of Georgia procedure. In the motion for rehearing, supra, the attention of the court was directed to **Globe & Rutgers v. Salvation Army**, 177 Ga. 890, 898, ruling the identical point in petitioner's favor. It must follow that the court denied recovery either upon the theory that the right to recover these premiums was not in petitioner, or that the failure to include the assessment provision in the policy was destructive of all the rights of petitioner. We will examine these grounds in their order.

(1) The collection of unpaid premiums was the duty of the liquidator. The statutes of New York provide:

> "The Superintendent * * * shall be vested by operation of law with the title to all of the property, contracts and rights of action of such insurer as of the date of the order so directing them to liquidate. * * *."
>
> Insurance Laws of New York, Sec. 404 (2).

The insurance laws of New York governing the liquidation of insolvent insurance companies specifically provide for the collection of premium balances in the liquidation proceedings in which the assessments are dealt with (Sec. 423, R. 30).

§ 423. Determination of Liability of Members for Other Indebtedness. If it shall appear that a member of a domestic mutual insurer is indebted to such insurer, apart from his liability to assessment, the court may, upon the application of the superintendent, in any order under section four hundred and twenty-two of this chapter directing such member to show cause why he should not be held liable to pay an assessment, likewise direct him to show cause why he should not be held liable to pay such indebtedness. And the liability of such member for such other indebtedness shall be determined in the same manner, and at the same time, that his liability for such assessment is determined, and the superintendent may likewise have judgment therefor, but without any additional costs.

Being a statutory liquidator, the courts of Georgia could not be closed to petitioner.

**O'Malley, Supt., v. Wilson**, 182 Ga. 97, 185 S. E. 109;
**Relfe v. Rundle**, 103 U. S. 222, 26 L. ed. 337;
**Clark v. Williard**, 292 U. S. 112, 129, 78 L. ed. 1160, 1170;
**Broderick v. Rosner**, 294 U. S. 629, 79 L. ed. 1100.

Having clearly demonstrated that petitioner established his right to recover premium balances from some of the respondents, it follows that a denial of this right not only destroyed rights guaranteed him by the contract clause (Article 1, Section 10), but it also deprived him of property without due process of law and was a clear discrimination against a citizen of New York.

**Coombes v. Getz**, supra, 285 U. S. 434, 76 L. ed. 866, where it was held (l. cit. 441):

> "The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon this court, but that is not

> so where the contract clause of the Federal Constitution is involved. * * *." This court "will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause."

The premiums were payable in New York and a construction by the Georgia court which destroys this obligation of the defendant to petitioner comes within the reviewing power of this Court.

## RESIDENTS OF GEORGIA WERE PARTIES TO THE NEW YORK LIQUIDATION PROCEEDINGS.

The Supreme Court of Georgia (R. 88, div. 3) held that Georgia defendants were not parties to the original proceedings, limiting this holding to the language, "we mean that they were not personally served, and that they have not had their day in court for the purpose of asserting their nonliability."

In another portion of the opinion (R. 90) it held that "it is of the essence of due process that one must be given an opportunity to be heard."

We assume that the court means an opportunity to be heard in the courts of Georgia. But this was not a privilege guaranteed to the respondents. The association which their joined could only be properly liquidated in the State of New York and they had ample opportunity to be heard there.

The petition alleges compliance with the statutory requirements of notice by publication and mail (R. 9), and the demurrers of the respondents admitted the truth of these allegations. The record discl[o]ses ample opportunity for appearance after notice of the proceedings had come to them. Though the assessments were confirmed (judgment of February 7, 1938, R. 35), the members were given sev-

eral additional extensions of time (R. 38), and they could have appeared at any time up to the filing of the Referee's report on September 8, 1939. It thus appears that a period of sixteen months elapsed from the time notice was given until the final judgment was made in the New York proceedings.

The finding that notice has been given to these members in accordance with the statutes "is reasonably calculated to give him (them) actual notice of the proceedings and an opportunity to be heard." Under such circumstances "the traditional notions of fair play and substantial justice * * * implicit in due process are satisfied."

> **Milliken v. Meyer**, No. 66, October Term, 1940, ... U. S. ..., 85 L. ed. 269, 273.

But even this opportunity was not necessary. Service on the corporation was service on the members in so far as the general question of liability to assessment is concerned, and the corporation did represent the members.

In **Bernheimer v. Converse**, supra, 206 U. S. 516 (l. cit. 532), this Court said:

> "It is said that the stockholder is held liable in a proceeding to which he is not a party. * * * The validity of such additional enactments depends not necessarily upon the personal service upon the stockholders, but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligation, and not in violation of constitutional rights. It is true that the stockholder is not necessarily served with process * * *, but no personal judgment is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered

for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to."

This principle is examined and approved in **Marin v. Augedahl**, supra, 247 U. S. 142, 62 L. ed. 1038.

In **Taggart, Ins. Commissioner, v. Wachter, Hoskins & Russell, Inc.**, 21 Atlantic Reporter (2) 141, 147 (Advance Sheets, August 16, 1941), the Court of Appeals of Maryland, in sustaining an assessment which had been approved by the Pennsylvania courts in a proceeding to which the Maryland policyholders were not parties, said:

> "A subscriber knew that it was essential to the plan of the organization which he was entering that uniformity of relationship, rights and obligations be maintained from the beginning through to dissolution and final contingent assessment, and he must be taken to have accepted as an essential condition of his membership that all steps required to accomplish the uniformity, all that affected subscribers as a whole, should be taken by the one authority. * * *"

Quoting from **Howarth v. Lombard**, supra, 175 Mass. 570, the court, at page 149, held further:

> "The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. The assessment was 'in principle, like the assessments made by the court upon the members of insolvent mutual fire insurance companies under the laws of this commonwealth which are binding upon the members to whom no actual notice is given.'"

The statutes of New York, fully set out in the pleadings

(R. 28), provide the method of levying these assessments and of giving notice to the policyholders by mail and by publication. Such procedure is in every respect equal to the requirements of the Minnesota legislation frequently before this Court.

In an assessment case recently decided, **Chandler v. Peketz**, 297 U. S. 609, 80 L. ed. 881, this Court (l. cit. 610-611) held:

> "We have held that the Minnesota provisions constituted a reasonable regulation for enforcing the liability assumed by those who became stockholders in corporations organized under the laws of that State; that the order levying the assessment is made conclusive * * *: that it is thus conclusive, although the stockholder may not have been a party to the suit in which it was made or notified that an assessment was contemplated."

Clearly, the Georgia residents were parties to the New York proceedings. They were bound by the judgments entered as to all matters common to policyholders as a class. Personal defenses remained open to them, and these respondents may yet assert these personal defenses, if any they have, in their answers in the trial court when this case is reversed and remanded. What are personal defenses have often been defined by this Court.

In **Great Western Telegraph Co. v. Purdy**, 162 U. S. 329 (cited by the Supreme Court of Georgia, R. 90), this court said:

> "* * * he had the right to plead a release, or payment, or the statute of limitations, or any other defense, going to show that he was not liable upon his contract of subscription."

But, of course, personal defenses do not include a denial of the very right from which liability springs, to wit, the applicability of the New York law. That right cannot be

denied by any state, whether based upon its decisions or upon its public policy.

**Broderick v. Rosner**, supra, 294 U. S. 629.

In **John Hancock Mutual Life Ins. Co. v. Yates**, 299 U. S. 178, 81 L. ed. 106, this court reviewed a decision of the Supreme Court of Georgia (182 Ga. 213) in which substantive rights of the insurance company, integrated in the policy by force of the statute, were denied force and effect on the theory that to do so would give extraterritorial effect to the New York statute.

In reversing the decision of the Georgia court this court pointed out **that the statutes of New York**, as construed by the highest courts of that state, **made the provisions relied on a part of the contract**, and ruled that the full faith and credit clause of the Federal Constitution did compel the application by Georgia of the New York statutes.

Similar reasoning by the Supreme Court of Georgia in the case under review should be reversed on the same grounds. It is significant that this Court, in deciding the **John Hancock case**, supra, cited as one of the applicable authorities **Modern Woodmen v. Mixer**, supra, 267 U. S. 544, thereby recognizing that cases involving associations having a ritualistic form of government are equally applicable to other insurance contracts.

THE JUDGMENTS ENTERED IN THE NEW YORK PROCEEDINGS WERE DENIED FULL FAITH AND CREDIT.

The scope of the judgments entered in the domiciliary proceedings will now be examined. That Court approved

(a) the 40 per cent assessment recommended by the Liquidator (Judgment of February 7, 1938, R. 34-5);

(b) the computation disclosing the amount due by each

policyholder arising from the assessment, and for other indebtedness due (Judgment entered August 11, 1938, R. 35);

(c) order and judgment finding sufficient proof of service by publication and notice by mail to each member (Judgment entered November 17, 1938, R. 38-40);

(d) the report filed by the Liquidator (Judgment of November 17, 1938, R. 38-40), including a consideration of the type of policies held by the Georgia defendants and a finding that all policyholders of this class were subject to assessment.[6]

(e) The judgment of the Referee, appointed to hear and determine the case (In re Auto Mutual Indemnity Company, 14 N. Y. Supp. [2] 601), ruling upon and denying every claim asserted by the respondents herein.

That the judgments approving the assessments are binding upon all members, irrespective of their residence, cannot be questioned.

In **Broderick v. Rosner**, supra, 294 U. S. 629, 79 L. ed. 1100, this Court considered the liability of New Jersey residents to assessments as stockholders of a Bank, chartered in New York, and said (l. cit. 643):

> "The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. * * * The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause. **If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey** (Georgia) **would have been obliged to enforce**

[6] The policy appears in the record (R. 47) and the pleadings allege [R. 21 (8) and R. 10] that this type of policy was before the Court when the assessments were approved.

**it, although the stockholders sued had not been made parties to the proceedings, and being nonresidents, could not have been personally served with process.** * * * The reason why in that case (Converse v. Hamilton, supra) the full faith and credit clause was held to require Wisconsin courts to enforce the assessment made in Minnesota was not because the determination was embodied in a judgment. Against the nonresident stockholders there had been no judgment in Minnesota. Wisconsin was required to enforce the Minnesota assessment because statutes are 'public acts' within the meaning of the clause, * * * and because the residents of Wisconsin had, by becoming stockholders of a Minnesota corporation, submitted themselves to that extent, to the jurisdiction and laws of the latter state. Where a State has had jurisdiction of the subject matter and the parties, obligations validly imposed upon them by statute must, within the limitations above stated, be given full faith and credit by all the other States."

In **Chandler v. Peketz**, supra, 297 U. S. 609 (l. cit. 610), this Court held:

"* * * the order levying the assessment is made conclusive."

And the judgment finding service perfected and determining that those persons holding policies of the type set forth were liable to assessment, is equally binding.

In **Marin v. Augedahl**, 247 U. S. 142, 62 L. ed. 1038 (l. cit. 149) this Court held:

"Charged with the duty, as the court was, of ascertaining whether there was any liability to be enforced, it was its province to consider and decide every question which was an element in that problem, including the one of whether the corporation was in the excepted class. That question required solution and the power to solve it was lodged in the court. The court did solve it, for, as is said in Neff v. Lamm, 99 Minn. 115, 117, 108 N. W. 849, the order making the assessment

is 'necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the excepted class.' Whether the decision was right or wrong is not open to discussion here. * * *.

"A judgment is conclusive as to all the media concludendi * * *, and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. * * * Whether the stockholder against whom the order is here sought to be enforced was personally a party to the suit in which it was made does not appear; nor is it material. * * * he was sufficiently represented by the corporation to be bound by the order in so far as it determined the character and insolvency of the corporation and other matters affecting the propriety of a general assessment such as was made."

"The decision of a referee appointed to hear and determine has the same effect as the decision of a justice of this (Supreme) Court."

**Kiernan v. Consolidated Gas and Gasoline Engine Co.**, 201 N. Y. Supp. 78.

"* * * the only defenses which he can make against it are those which he could make in the courts of Kansas (New York)."

**Hancock National Bank v. Farnum**, supra, 176 U. S. 640, 644.

The Supreme Court of Georgia found a timely offer of petitioner to introduce at the trial of the case "the acts of the legislature of the State of New York, referred to in the petition, duly authenticated by the great seal of that State, and * * * the records and judicial proceedings referred to, duly attested under the seal of the court, all as provided by section 38-627 of the Code of Georgia, and by the United States Revised Statutes, Section 905, title 28, section 687" (R. 87).

And further, that petitioner contended "that said public acts, judicial proceedings and records of the State of New York are entitled to and should receive full faith and credit in the courts of this State and in this proceeding, as is specifically provided in Section 38-627 of the Code of Georgia of 1933, and by article 4, section 1, of the constitution of the United States (Code, Sec. 1-401); and that any judgment which denies or has the effect of denying to the judgments and statutes aforesaid the full force and effect to which they are entitled under the constitution and laws aforesaid, abridges the privileges and immunities of petitioner as a citizen of the United States, contrary to the fourteenth amendment of the constitution of the United States" (R. 87).

**It is, therefore, apparent that the rights arising out of the New York statute and New York proceedings were considered by the trial court along with the privileges asserted under the Constitution of the United States, and that these privileges were denied by the trial court and by the Supreme Court of Georgia. For their error in so doing, the case should be reversed and remanded with direction.**

## EVEN IF LIABILITY BE MEASURED BY THE LAWS OF GEORGIA, DEFENDANTS WERE LIABLE.

The court below ruled that the assessments, though properly declared and approved in New York, would not be enforced in the courts of Georgia at the instance of a citizen of New York because the policy contained in its face no provision for assessment. But a similar defense by Georgia residents was overruled by the Supreme Court of Georgia in **Alma Gin & Milling Co. v. Peeples**, 145 Ga. 722. There the Supreme Court of Georgia pointed out the distinction between the rights of the policyholder when he seeks to recover as an insured and his liabilities when he is sued as one of the insurers. There, as here, the cred-

itors sought to recover assessments under the provisions of the constitution and by-laws. We quote from the decision:

> "Among the grounds of demurrer insisted upon in this court was the one based upon the failure of the company to attach to or incorporate in the policy a copy of the constitution and by-laws and application; and the demurrants insist that a failure to do this * * * deprived the plaintiffs of the right to rely upon the stipulations * * * or the provisions in the by-laws and constitution of the company, which obligated the policyholders to pay the assessments sought to be collected by this suit."

The defense in the Alma Gin Company case was based upon the Act of 1906, which required that stipulations and by-laws be made part of the policy, otherwise they were unenforceable. In overruling this defense the Supreme Court of Georgia said:

> "We agree with this contention of the defendants in error, that the act of 1906 is applicable in a case where suit is brought on a policy by the holder thereof against the company to establish the liability of the company to the insured, and to obtain a judgment in favor of the latter; but it is not applicable in a case like this, that is, of a suit to establish the liability of policyholders to pay assessments, and to compel them to contribute to the payment of losses sustained by another policyholder."

From the above it is clear that the relief obtainable by a resident of Georgia was denied to petitioner. **Such discrimination against a resident of New York denied to him the equality due all citizens**, to which he was entitled under Article IV, Section 2, Paragraph 1, of the Constitution of the United States, **and also deprived him of property without due process of law** and the equal protection of the law, **contrary to the provisions of the Fourteenth Amendment**.

It may be insisted that a federal question of this kind arises only from the construction of an act and not from the erroneous decision of the Court. But the decision of the Supreme Court of Georgia construes its statutes (without naming them) and holds [R. 83 (5)] that under the insurance laws of Georgia the acceptance of a policy of insurance in a mutual company does not charge the policyholder with notice of the contingent liability provided for in the constitution and by-laws. But the general law of Georgia is to the contrary (R. 101).

Code of Georgia of 1933, **Section 56-1401**, provides:

> "The contract of insurance is sometimes upon the idea of mutuality, by which each of the insured becomes one of the insurers, * * * without a charter, such an organization would be governed by the general law of partnership; when incorporated, they are subject to the terms of their charters."
>
> "**Section 56-1403. By-laws become part of policy.** The rules and regulations of a mutual company, adopted in pursuance of the charter, become a part of each policy, and all the insured are presumed to have notice thereof. * * *"

It follows that by the application of the laws of Georgia, the rules and regulations become part of the policy and were enforcible at the suit of a resident. To deny a similar privilege to a citizen of New York is a discrimination of the type referred to in the preceding paragraph.

## VII.

## CONCLUSION.

We conclude this brief as we began it. The appeal is controlled by the principles clearly enunciated by this Court in the leading cases heretofore mentioned.

Supreme Council of Royal Arcanum v. Green;

Sovereign Camp W. O. W. v. Bolin;
Chandler v. Peketz,

and to which may be added

Broderick v. Rosner.

An examination of the principles there announced demonstrate clearly the injustice suffered by the petitioner in the court below, and that the judgment deprived him of the constitutional privileges asserted in his pleadings.

We have pointed out the principal errors underlying the decision of the Supreme Court of Georgia. For a critical analysis of the entire decision we respectfully refer the Court to our motion for rehearing, filed below (R. 96-107).

In comparing the errors pointed out in this motion with the opinion as it appears in the record, one difference will be noted. We asserted (R. 97) that the court was in error in its statement "the corporation was not a party" in the liquidation proceedings. When the decision was originally announced it was premised upon **this** statement of fact and supported by the citation of **Southworth v. Morgan,** 205 N. Y. 293, 98 N. E. 491 (R. 98), a case involving liquidation proceedings in a state other than the domicile of the corporation. The Supreme Court of Georgia **withdrew the erroneous statement of fact by revising its opinion** (R. 89), as it had a right to do under its own rules. But the error in the decision did not arise solely from the misstatement of fact, it arose from the application of the principles of law contained in **Southworth v. Morgan.** Entirely different principles of law control if the proceedings are in the domicile of the corporation, but the Supreme Court of Georgia did not examine these principles in the light of the facts truly stated. It adhered to its original opinion, arrived at from a misconception of the facts. As the law of the domi-

cile was entitled to full faith and credit under the constitutional provisions which we have discussed, the error in the decision below is clear.

The matters of public importance involved in this appeal have been fully stated in the petition for certiorari and in the brief supporting the same (pp. 26-27) and will not be repeated. As we there said, with full citation of authority, an assessment which is given one definition in one state and a different definition in another state is no assessment at all. It destroys the entire theory of mutuality.

Petitioner is charged with the specific duty of collecting assessments from the policyholders of this company, thereby creating a fund available to members of the public who may assert claims. But more than this, petitioner, as Superintendent of Insurance of the State of New York, has the duty of determining the solvency of these mutual casualty companies, incorporated in that state, and the fact of this qualification is accepted by the Motor Division of the Interstate Commerce Commission and various Public Service Commissions as evidence of the solvency of the qualifying companies.

Mutual insurance companies have no capital other than the contingent liability provided by statute. In 1939 the premiums collected by mutual companies, chartered in New York, approximated fifty million dollars. If the right of assessment conferred by the charter receives general recognition, then the contingent liability is twice this amount, a sum amply sufficient to provide reserves for any emergency. But if this assesment is not enforceable in some of the states in which the company did business, then this must be given consideration in determining the solvency of the company. If there is added to the loss of assessment

the burden of claims arising in states where the assessment is not collected,[7] a complicated and confused result follows.

Unless the validity of the assessment in every State in the Union is established by a judgment of this Court requiring recognition of the New York statutes and proceedings, the physical difficulty and the cost of recovering the assessments will render the proceedings futile. All claimants, whether policyholders or members of the public, will be left without remedy.

The business of insurance cannot be properly conducted if "divergent, variable and conflicting criteria" (Royal Arcanum v. Green, 237 U. S., at 542) arise in its operation in States other than the domicile. The judgment should be reversed.

Respectfully submitted,

ELLIOTT GOLDSTEIN,
MAX F. GOLDSTEIN,
ALFRED C. BENNETT,
Counsel for Petitioner.

M. F. GOLDSTEIN,
ARTHUR G. POWELL,
BURKETT D. MURPHY,
JAMES N. FRAZER,
JAMES W. DORSEY,
1130 C. & S. Bank Building,
Atlanta, Georgia.
ALFRED C. BENNETT,
160 Broadway,
New York City.

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[7] Many of the respondents in this case have filed large claims in the New York liquidation proceedings. Among them are the respondents who filed a brief in this Court in opposition to the grant of the certiorari. The public reports of the Superintendent, of file in the case, indicate claims filed by **Roy R. Raegin, $1,800.00**; **Georgia Motor Express, $3,060.00**; **Southeastern Stages, $8,596.00**; and the decision in **Pink, Supt., v. Georgia Stages, Inc.**, 35 Fed. Supp. 437 (Finding of Fact 10½, 35 Fed. Supp. 441), discloses an allowance of $12,502.00.

Georgia residents, while relieved of assessments, will participate in and diminish a fund available to other policyholders, who have paid their assessments.